

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.

vs.

LAWSON SOFTWARE, INC.

:
: Civil Action No.
: 3:09CV620
:
:
: September 27, 2010
:

COMPLETE TRANSCRIPT OF THE FINAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

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1 the exhibits have already been agreed by court order.

2 THE COURT: So all that's left is the one
3 page?

4 MS. STOLL-DeBELL: Yes, sir.

5 THE COURT: Thank you, ma'am.

6 Okay. I guess we start with 97 and 98.

7 MS. ALBERT: DX 97 and DX 98 are related
8 issues. They are manuals that relate to this J CONN
9 prior art, alleged prior art system.

10 I am going to withdraw our Rule 26 objections
11 to both of those. But these should be excluded per
12 your order on ePlus' motion in limine No. 2 as they
13 were not cited in Lawson's second supplemental
14 invalidity contentions.

15 MS. STOLL-DeBELL: Your Honor, I believe you
16 reserved judgment on this issue as to these specific
17 manuals, and that is because we argued that -- and I
18 can pull up your order on that. So you granted their
19 motion to strike.

20 These J CONN manuals are -- I think we've
21 heard a number of times today that the parties can use
22 additional evidence in support of arguments that were
23 disclosed. And that's what this falls under. These
24 are some additional J CONN manuals relating to the J
25 CONN prior art system that we did disclose in our

1 second supplemental invalidity contentions.

2 THE COURT: What does the order say on motion
3 in limine No. 2?

4 MS. ALBERT: The order says that for the
5 reasons set forth on the record, plaintiff's motion in
6 limine No. 2 to enforce the Court's prior orders of
7 May 24, 2010, and May 25, 2010, and exclude any expert
8 opinion, other testimony or argument pertaining to
9 alleged prior art and invalidity theories not set
10 forth in the defendant's court ordered second
11 supplemental statement is granted.

12 As to both these two documents, they are not
13 disclosed in the second supplemental invalidity
14 contentions. So this is about the fourth bite at the
15 apple for arguing to get in evidence that the Court
16 excluded three times already.

17 THE COURT: I think at one point in time I
18 did reserve judgment on something, but I also thought
19 that that order subsequently took care of the
20 reservation of judgment, but I have to say I'm not
21 sure about that. So --

22 MS. STOLL-DeBELL: Your Honor, in your order,
23 Docket No. 230, that was your order on their motion to
24 strike certain things from Dr. Shamos' report.

25 THE COURT: What was that? The thing she

1 just read?

2 MS. ALBERT: This is the order on motion in
3 limine No. 2, which was --

4 THE COURT: After that.

5 MS. ALBERT: Was after that. Subsequent.

6 THE COURT: In other words, I did something
7 on the motion to strike. I said I'm going to hold it
8 in abeyance until I understand more. Then I got the
9 motion in limine, and I ruled on the motion in limine,
10 and I kept it out, I think. But I'm not sure that's
11 right. And you're shaking your head no. And you-all
12 are much closer to it than I am.

13 MS. STOLL-DeBELL: Your Honor, I think we
14 argued it, and I argued again that this is not new
15 prior art reference. We disclosed J CONN. The J CONN
16 system. It's the second supplemental invalidity
17 statement. I can hand it up and show you. We said
18 we're going to rely on the J CONN system as prior art.

19 Now, we did not cite those specific documents
20 in the second supplemental invalidity statement, but
21 they are J CONN manuals. They are just additional
22 evidence in support of an argument that was properly
23 and fully disclosed. It's the same thing as what
24 Dr. Weaver -- he had a whole bunch of additional
25 evidence. Your Honor looked at it and said it's just

1 additional evidence in support --

2 THE COURT: Of the same disclosed theory.

3 MS. STOLL-DeBELL: This is the same issue.

4 We've always said J CONN is a system we're relying on.

5 And these are J CONN manuals.

6 MS. ALBERT: Your Honor, Dr. Shamos, their
7 expert, doesn't even rely on these two manuals for any
8 opinions, nor are they in the second supplemental
9 invalidity contentions. So how are we properly on
10 notice of these documents?

11 THE COURT: Wait a minute. They're not in
12 there, but the J CONN is identified as prior art,
13 right?

14 MS. STOLL-DeBELL: Yes, Your Honor.

15 THE COURT: In the second supplemental
16 contentions?

17 MS. STOLL-DeBELL: Yes, the J CONN system.
18 Actually, Dr. Shamos cites to the manual we cited in
19 the second supplemental in support of J CONN plus
20 these two. But they are all J CONN manuals. We've
21 always said from the very beginning of time we're
22 going to rely on J CONN. These are just additional
23 evidence.

24 And plaintiff's Dr. Weaver is allowed to rely
25 on additional evidence, and Dr. Shamos should, too.

1 They know J CONN is in this case. It's always been in
2 this case. There's no surprise here.

3 MS. ALBERT: He hasn't disclosed any opinions
4 regarding these two documents.

5 THE COURT: What does he say about these
6 documents?

7 MS. STOLL-DeBELL: I can bring up a printed
8 copy of his claim chart where he cites to them if
9 you'd like, Your Honor.

10 THE COURT: Show them to her.

11 MS. ALBERT: Can you point to a page?

12 THE COURT: What she's doing now is she's
13 walking.

14 MS. STOLL-DeBELL: Can I hand up --

15 THE COURT: Okay.

16 MS. STOLL-DeBELL: Your Honor, if you'll give
17 me just a minute to look it up.

18 THE COURT: Okay.

19 MS. STOLL-DeBELL: I didn't realize they were
20 saying this wasn't cited.

21 THE COURT: The more I think about it, the
22 more what I reserved judgment on was very early in the
23 process, and these motions in limine came after that,
24 and we're on a more specific briefing of what I had
25 reserved judgment on, but I just don't have a

1 recollection beyond that.

2 MR. ROBERTSON: May I make a suggestion then?
3 Why don't we reserve on this and show you the
4 transcript where you specifically ruled on that when
5 you granted motion in limine No. 2, which is quite
6 specific, that nothing further can come in if it
7 wasn't in the second supplemental. I feel like we've
8 fought this battle four times now.

9 THE COURT: Wait a minute. So has she.

10 MR. ROBERTSON: I know, but Your Honor has
11 ruled three times.

12 THE COURT: I know, but the fourth time is a
13 charm.

14 MR. ROBERTSON: Well, your Honor, then I have
15 a few ones I'd like to reopen, like the damages issue.

16 MS. STOLL-DeBELL: Well, let's open
17 Dr. Shamos' invalidity contention, too.

18 MR. ROBERTSON: Let's have some closure, Your
19 Honor.

20 THE COURT: I've got a better idea. Why
21 don't we dismiss this case without prejudice. Let you
22 refile it and start all over again. All right.

23 MS. ALBERT: Your Honor, I thought that your
24 ruling on the original motion going back to what
25 Dr. Shamos can testify about is only prior art that

1 was disclosed in the second supplemental invalidity
2 contentions.

3 They are conceding that these two documents
4 are not disclosed in the second supplemental --

5 THE COURT: I think she actually is not
6 conceding that. I think she's saying they are
7 disclosed.

8 MS. STOLL-DeBELL: I said the J CONN system
9 was disclosed as prior art in our second supplemental.
10 These two specific documents were not cited, but J
11 CONN as a system was.

12 THE COURT: It is cited in Shamos's report?

13 MS. STOLL-DeBELL: It is. So if you look at
14 page 1, if you go to the P.O. Writer, J CONN tab, page
15 1.

16 THE COURT: The '172 patent?

17 MS. STOLL-DeBELL: Yes, Your Honor. You will
18 see there are sort of column headings that are
19 letters, and then row headings that are numbers. So
20 if you go to that green column, it's column S, row 15.
21 It says, "Shamos Opinion Re: J CONN." And there are
22 some folks from different manuals.

23 The last two there like the last one is
24 125142. I believe that is Exhibit 98.

25 THE COURT: What about 97?

1 MS. STOLL-DeBELL: I can find a cite for
2 that. It's in here. I think the one before it is --
3 if you go to the next page, page 2, Your Honor, column
4 S, line 17.

5 THE COURT: Yes.

6 MS. STOLL-DeBELL: I'm sorry. I think I have
7 slight dyslexia. Hold on. I'll find it.

8 THE COURT: Here's what we're going to do on
9 this. I want to make sure I get it right. We file a
10 briefing on the same schedule as the other briefing we
11 did, whatever those dates were. And let's see. These
12 are your objections, right?

13 MS. ALBERT: Yes, sir.

14 THE COURT: You go first. You respond. You
15 go second.

16 I think what we may be talking about here
17 is that -- I'm wondering whether what we're talking
18 about is whether I had the Shamos report when I made
19 the ruling, and I said these things weren't disclosed
20 originally, and that's why they couldn't come in.
21 These contentions weren't.

22 And I believe that, as I'm reflecting upon
23 it, there was something substantively -- it wasn't
24 just that the evidence wasn't disclosed, it was that
25 it was a new substantive theory that was being raised

1 by virtue of these references, and I believe that's
2 what I was keeping out.

3 I do believe this, though, that if your
4 expert is permitted, Weaver, to cite in support of
5 your contentions on infringement evidence, ePlus, that
6 wasn't cited in the infringement contentions, but
7 support theories that were disclosed, then the same
8 rule has to apply to them.

9 And if that's where we are, then I may have
10 made a mistake, and if I did, I'm going to correct it.
11 That's the way it is. Because that rule has to apply
12 both ways.

13 MR. ROBERTSON: I understand, Your Honor.
14 But you have to remember that these two situations
15 were very different procedural postures because
16 Weaver, you ruled in their motion in limine, did
17 adequately disclose early on in December all of his
18 theories and with numerous exhibits. But you then
19 said the discovery proceed for another five months,
20 and he was permitted to do that.

21 Very different situation. They didn't
22 adequately disclose their invalidity contentions. You
23 ordered them as a result of motion practice to do the
24 second supplemental statement.

25 Then, Your Honor, they filed the Shamos

1 report. And we filed a motion with respect to the
2 Shamos report. You ruled then that it was going to be
3 confined to the second supplemental. Then they
4 continued to try to add additional exhibits, and we
5 brought the motion in limine. So they are very
6 different procedural postures.

7 THE COURT: I'm sure you'll synthesize all
8 that for me.

9 MR. ROBERTSON: Because it does apply to a
10 number of these exhibits that we have objections to.

11 THE COURT: I understand.

12 MR. ROBERTSON: You might want to reserve on
13 those until we can document for Your Honor. And if I
14 might be permitted, I'd like to be able to quote Judge
15 Payne on Judge Payne from that last hearing when you
16 rather express as to what you were ruling and the
17 reason for it.

18 THE COURT: That's always a dangerous thing
19 to do. But the bottom line here is that we really
20 have to do what's right. And if I made a mistake, I'm
21 going to try to correct it here. If I blew it, I've
22 got to get it right as best I can. I don't proclaim
23 to be infallible, and I know you-all are going to try
24 to add to that reputation if it goes up on appeal. So
25 that's okay. But I'd like to do what I can to save

1 '94?

2 MS. ALBERT: That's correct.

3 THE COURT: I mean '93 and '94.

4 MS. ALBERT: Correct.

5 THE COURT: Okay. It looks to me like she's
6 got a point there if it's the fifth revision and
7 there's testimony to that effect. I don't see how
8 this could come in without testimony establishing its
9 bona fides. You can't make that decision from the
10 face of it.

11 MR. SCHULTZ: There will be testimony from
12 Mr. Chuck Gounaris, who will testify as to this
13 document and will testify to any iterations that took
14 place and --

15 THE COURT: Well, I'm going to reserve until
16 you get a foundation because you need a foundation on
17 this. It won't fly on its own.

18 112.

19 MS. ALBERT: 112 is a video exhibit relating
20 to this Technical Viewer 2 System. We have an
21 objection based on ePlus' motion in limine No. 2 and
22 your order that this specific document was not
23 disclosed in the second supplemental invalidity
24 contentions per your order, and, therefore, it's
25 excluded under your ruling on ePlus' motion in limine

1 No. 2.

2 THE COURT: Okay. So that's reserved for
3 your briefing. It's the same as the earlier one in
4 '97 and '98.

5 MS. ALBERT: In addition, we have an
6 objection. This one is not disclosed in Dr. Shamos'
7 report, nor is it disclosed in response to -- we had a
8 contention interrogatory that we served on Lawson.
9 Interrogatory No. 9, which I can hand up to you. It
10 asked that Lawson describe in detail all facts and
11 identify all documents that Lawson contends support or
12 tend to support its defenses, affirmative defenses,
13 and counterclaims, if any, in this action.

14 They cited to some specific documents
15 relating to IBM TV2, but they did not cite to this
16 particular one.

17 THE COURT: You mean the video. They didn't
18 cite to the video.

19 MS. ALBERT: So we have an objection based on
20 Rule 26 on this. And we also have a relevancy
21 objection since it hasn't been disclosed or cited in
22 any expert report, interrogatory answer, or the second
23 supplemental invalidity contentions.

24 MR. SCHULTZ: Let me start with the relevancy
25 objection, Your Honor. It goes to TV2. It's further

1 support with respect to the documents that were set
2 forth in the invalidity contentions. Essentially,
3 what it has is screen shots within it that are the
4 same as are in the brochure that is cited in the
5 invalidity contentions.

6 Your Honor, it is not by itself by Bates
7 number cited in the invalidity contentions; however,
8 as we've already had discussion on, TV2 System has
9 been cited. It's been gone through in depth, and this
10 is further support of the TV2 reference.

11 MS. ALBERT: Also, respectfully, Your Honor,
12 this particular document is undated. So there's no --
13 or the video is undated. So there's no way to really
14 corroborate that it is indeed prior art.

15 MR. SCHULTZ: Your Honor, there is evidence
16 of that. I can pull out the testimony from the SAP
17 trial. We'll have the testimony of Pamela Eng, who is
18 actually in the video and helped create the video.
19 She actually was pregnant after the time that the
20 video was created, and she can date the video based on
21 that that it was made in 1992 or before. So, yes, we
22 have the evidence and the corroboration with respect
23 to the prior art aspect of the video.

24 MS. ALBERT: Your Honor, naked testimony
25 cannot be used as corroboration.

1 MR. SCHULTZ: Your Honor, there's other
2 documents that further corroborate the fact that the
3 video was dated prior to 1992 including the 1991
4 brochure and general information manual with respect
5 to the TV2 System.

6 Ms. Eng by herself was selling this system at
7 trade shows throughout the United States. She can
8 testify there is corroborating evidence. The
9 objection has no merit.

10 MS. ALBERT: Well, I mean, he hasn't
11 addressed by Rule 26 objection that it wasn't cited in
12 response to a contention interrogatory.

13 MR. SCHULTZ: Your Honor, I did address that
14 issue. That by its reference, by its Bates number was
15 not included there; however, the TV2 reference was.
16 ePlus was on notice of the TV2 System and it goes to
17 the same issue that we've already addressed.

18 THE COURT: So the issue is being reserved
19 and there's going to be briefing.

20 MR. SCHULTZ: Correct.

21 MS. ALBERT: Well, we have a specific
22 contention interrogatory that asked that you identify
23 every document that you had relied on to support your
24 affirmative defenses. You have a listing of documents
25 about TV2, and it does not include this document. And

1 I can hand that up to the Court.

2 THE COURT: I don't need to. It seems to me
3 he doesn't dispute that. He said it wasn't in there.
4 So the question is: Are you surprised? Are you
5 prejudiced? Can it be cured? Is there a problem
6 applying the Southern States analysis?

7 MS. ALBERT: We are surprised.

8 THE COURT: How is it going to foul up the
9 trial? How are you surprised?

10 MS. ALBERT: Well --

11 THE COURT: Given that you knew everything --
12 you knew everything he's talking about, he says, about
13 Ms. Eng, and about the system. So how are you
14 surprised, I guess, is the question.

15 MS. ALBERT: It wasn't disclosed anywhere.

16 THE COURT: I know.

17 MS. ALBERT: Not in the contention
18 interrogatories, not in the second supplemental
19 invalidity contentions that Your Honor ordered that
20 they disclose everything that they would rely on,
21 their invalidity positions. It wasn't relied on by
22 Dr. Shamos, and our expert didn't have an opportunity
23 to rebut this particular exhibit because it was never
24 disclosed to us that they intended to rely on it.

25 MR. SCHULTZ: Your Honor, it's the same

1 expert that they had in the SAP trial. It's fully
2 disclosed that the TV2 System is a piece of prior art
3 that Lawson is relying upon in this case.

4 THE COURT: Was this same issue litigated in
5 the SAP trial?

6 MR. SCHULTZ: It was.

7 THE COURT: So how are you surprised? If you
8 have tried it once, you can't really be surprised.
9 And you can cure the surprise because you know how to
10 deal with it. So how is it going to foul up the
11 trial? Just get your guy to testify about it. Is it
12 the same expert you had in the SAP trial or a
13 different one?

14 MS. ALBERT: It's the same expert, but the
15 issue of obviousness of RIMS and TV2 was not actually
16 before the jury in the SAP case.

17 THE COURT: They didn't testify about that?

18 MS. ALBERT: Right.

19 THE COURT: All right. It seems to me as if
20 you were asked to disclose those things in a
21 contention interrogatory and you didn't. And you
22 admittedly didn't. And while they had some general
23 knowledge about Ms. Eng and what she did and about the
24 viewer, this particular piece of evidence is different
25 than the other evidence that they were told about and

1 that you were going to use.

2 Now, tell me this: What's different about
3 this video than what they already knew?

4 MR. SCHULTZ: There's really nothing that's
5 different.

6 THE COURT: Well, why isn't it cumulative?
7 Why do we need it anyway?

8 MR. SCHULTZ: It shows the operation of the
9 system that is shown in photographs in the brochure.
10 It's testimony that the jury can take a look at and
11 actually see the operation of the system that they can
12 only see the photographs of in the brochure.

13 We have in our responses to the invalidity
14 contentions a paragraph that Pamela Eng will testify
15 with respect to this issue. So there should not be
16 any surprise.

17 THE COURT: To what issue?

18 MR. SCHULTZ: To the TV2 issue.

19 THE COURT: I mean to the video or just to
20 the issue of what TV2 is about.

21 MR. SCHULTZ: She's just testifying -- the
22 video is not disclosed per se in these documents. I
23 agree with that, Your Honor. I'm just saying there's
24 no surprise because the whole system is at issue
25 already.

1 THE COURT: So it's really a repetition.
2 It's a moving version of what there is in the still
3 version; is that what you're saying?

4 MR. SCHULTZ: It's more descriptive to the
5 jury to see what actually TV2 was at the time.

6 THE COURT: Okay. Anything else?

7 MS. ALBERT: No, Your Honor.

8 THE COURT: I think the objection is
9 overruled on both points, Rule 26 and relevance, but
10 I'm still reserving on the other issue subject to the
11 brief.

12 All right. 121.

13 MS. ALBERT: Your Honor, DX 121 is one
14 isolated chapter out of some larger document. The
15 document is undated.

16 THE COURT: Excuse me. Where does this
17 document come from? Do you know?

18 MS. ALBERT: It came from Lawson.

19 THE COURT: Lawson produced it. Okay.
20 Excuse me. So it's part of something larger. Clearly
21 it is.

22 MS. ALBERT: It doesn't indicate on its face
23 the version of -- this relates to the purchase of
24 what's called P.O. Writer, alleged prior art.

25 THE COURT: But it's prior art issue, and it

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2 FOR THE EASTERN DISTRICT OF VIRGINIA
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13 UNITED STATES DISTRICT JUDGE

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1 MR. ROBERTSON: I'll withdraw the objection to that,
2 Your Honor.

3 THE COURT: Next one, 123:8 through 124:25.

4 MR. ROBERTSON: This has to do with the data
5 interface utility, and my notes reflect that Dr. Shamos doesn't
6 rely on it. Whether the underlying document wasn't objected
7 to, the fact is, it doesn't have any tendency to prove a fact
8 that is in dispute, makes it not relevant for purposes of any
9 invalidity analysis that Dr. Shamos might be offering. I
10 understand he cited it, but -- it was considered, but he has no
11 opinions with regard to it.

12 THE COURT: If he has no opinions with respect to it,
13 then I don't see how it's relevant.

14 MS. STOLL-DeBELL: Your Honor, I think it's rebuttal
15 testimony because this database data interface utility is a
16 mechanism to automatically load catalog data into PO Writer,
17 very similar to Lawson's PO-536 that ePlus is relying on to say
18 Lawson's system has catalogs and Lawson infringes. And so this
19 testimony and that document are rebuttal evidence.

20 It was cited in our second supplemental invalidity
21 contentions and was listed in Dr. Shamos's report. Albeit he
22 didn't put a cite to that specific document in his claim chart,
23 I do think it's rebuttal testimony to their infringement
24 position.

25 THE COURT: How does it come in if he didn't testify